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In the Supreme Court of the United States

RAQUEL, PETITIONER

v.

EDUCATION MANAGEMENT CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Petitioner is the author of an original musical composition—a song entitled "Pop Goes the Music"—that is subject to copyright. Petitioner submitted an application for copyright registration to the Copyright Office, together with a videotape of a commercial in which that song was performed. Petitioner does not have a copyright in the commercial; its copyright extends to the song performed in the commercial. In the space labeled "nature of this work" on the application for registration, petitioner described the work as "audiovisual." In the portion of the application labeled "nature of authorship," petitioner wrote "[a]ll music & lyrics & arrangements." In the portion of the application that calls for the title of the work, petitioner gave the title of its song, "Pop Goes the Music."

The question presented is whether petitioner's description of the "nature of this work" as "audiovisual" constitutes a material misstatement that might invalidate the copyright registration issued by the Copyright Office, and thus warrant dismissal of petitioner's infringement suit.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Discussion	9
Conclusion	19
Appendix A	1a
Appendix B	9a

TABLE OF AUTHORITIES

Cases:

Baron v. *Leo Feist, Inc.*, 173 F.2d 288 (2d Cir. 1949)	12
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	19
Data Gen. Corp. v. *Grumman Sys. Support Corp.*, 36 F.3d 1147 (1st Cir. 1994)	2
Eckes v. *Card Prices Update*, 736 F.2d 859 (2d Cir. 1984)	11
Lawrence v. *Chater*, 516 U.S. 163 (1996)	17, 18
Masquerade Novelty, Inc. v. *Unique Indus., Inc.*, 912 F.2d 663 (3d Cir. 1990)	7
Mazer v. *Stein*, 347 U.S. 201 (1954)	19
Schmidt v. *Espy*, 513 U.S. 801 (1994)	18
Slekis v. *Thomas*, 525 U.S. 1098 (1999)	18
S.O.S., Inc. v. *Payday, Inc.*, 886 F.2d 1081 (9th Cir. 1989)	10
Stutson v. *United States*, 516 U.S. 163 (1996)	18
Thomas v. *American Home Prods., Inc.*, 519 U.S. 913 (1996)	18
Trandes Corp. v. *Guy F. Atkinson Co.*, 996 F.2d 655 (4th Cir.), cert. denied, 510 U.S. 965 (1993)	2
Urantia Found. v. *Maaherra*, 114 F.3d 955 (9th Cir. 1997)	12

Cases—Continued: Page

Washingtonian Publ'g Co. v. *Pearson*, 306 U.S. 30 (1939) 19
Whimsicality, Inc. v. *Rubie's Costume Co.*, 891 F.2d 452 (2d Cir. 1989) 7, 10

Statutes and regulations:

17 U.S.C. 102(a)(1) 3
17 U.S.C. 102(a)(2) 3
17 U.S.C. 102(a)(5) 3
17 U.S.C. 409 ..... 1, 2, 5
17 U.S.C. 409(2) 2
17 U.S.C. 409(6) 2
17 U.S.C. 409(7) 2
17 U.S.C. 409(8) 2
17 U.S.C. 409(11) 2
17 U.S.C. 411(a) (1994 & Supp. IV 1998) 2
37 C.F.R. 201.2(b)(7) 3

Miscellaneous:

Compendium of Copyright Office Practices, Compendium II (Feb. 1988) 3, 4, 10, 14, 15, 16, 1a
65 Fed. Reg. 41,508 (July 5, 2000) 10, 13, 14, 15, 16, 17, 19, 9a
H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) 3
2 M. & D. Nimmer, *Nimmer on Copyright* (2000) 10, 11

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The copyright statute provides a system for the registration of original works with the Register of Copyrights. See 17 U.S.C. 409. Failure to register a work does not prevent it from being protected by copyright. But valid registration of a copyright is generally a prerequisite to the filing of a suit for infringement. The copyright statute declares that "no action for infringement of the copyright in

any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title." 17 U.S.C. 411(a) (1994 & Supp. IV 1998).[1]

The copyright statute specifies that "application for copyright registration shall be made on a form prescribed by the Register of Copyrights." 17 U.S.C. 409. The application must include, among other things, the work's author and title, the year in which the work was completed, and the date and nation of the work's first publication (if it has been published). 17 U.S.C. 409(2), (6), (7) and (8). The statute further provides that applicants for registration must provide "any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright." 17 U.S.C. 409(11).

Pursuant to 17 U.S.C. 409, the Register of Copyrights has promulgated the application form at issue here, Form PA. See Pet. App. 77a. Form PA is used to apply for registration of a copyright in a work of the performing arts, including a musical composition or arrangement. Form PA requests, among other things, information relating to the "title of th[e] work," the "nature of th[e] work," and the "nature of authorship." *Ibid.* Form PA instructs applicants to complete the nature-of-authorship space by "describ[ing] [the] nature of material created by this author in which copyright is claimed." *Ibid.*

Consistent with that instruction, the Copyright Office's administrative manual of copyright examining practices—

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[1] If registration has been refused by the Copyright Office, the applicant is entitled to institute an action for infringement if notice is served on the Register of Copyrights. 17 U.S.C. 411(a) (1994 & Supp IV 1998). The requirement of registration or notice, some courts have held, is jurisdictional. See, *e.g.*, *Data Gen. Corp.* v. *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1163 (1st Cir. 1994); *Trandes Corp.* v. *Guy F. Atkinson Co.*, 996 F.2d 655, 658 (4th Cir.), cert. denied, 510 U.S. 965 (1993).

Compendium of Copyright Office Practices, Compendium II (Feb. 1988) (*Compendium II*)[2]—explains ~~that~~ the "nature of authorship" portion of the application generally "defines the scope of the registration; therefore, it represents an important copyright fact." *Compendium II*, § 619, at 600-70. "The nature-of-authorship statement," the Compendium continues, "is a brief general statement of the nature of the author's contribution to the work," *id.* § 619.02, at 600-70, and thus identifies those matters in which the author may claim a copyright. "[T]he author's contribution," *Compendium II* adds, "may be described in terms of the categories specified in [17 U.S.C. 102(a)] in the copyright law." *Ibid.* Those categories include, for example, "literary works," "musical works," and "pictorial, graphic, and sculptural works." 17 U.S.C. 102(a)(1), (2) and (5).

The "nature of this work" portion of the application is, from the Copyright Office's perspective, less significant. As is the case with all copyrightable works, a copyrightable musical work must be fixed in a tangible medium of expression. The fixation may take the form of an audiotape, sheet music, videotape, computer disc or tape, or even handwriting on a paper napkin. See H.R. Rep. No. 1476, 94th Cong. 2d Sess. 53 (1976). *Compendium II* indicates that, in completing the nature-of-work space, it is permissible to describe the medium of expression in which the work has been fixed and in which it is being deposited with the Copyright Office:

> Forms PA and VA contain a nature-of-work space. This space should give a description of the *general* nature and

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[2] *Compendium II* is used by Copyright Office staff in making registrations and recording documents. See 37 C.F.R. 201.2(b)(7). It is available to the public from the Government Printing Office. For the Court's convenience, relevant portions of *Compendium II* are reproduced in Appendix A to this brief.

> character of the work being registered. *A description of the physical form of the work is generally acceptable.*

Compendium II, § 614, at 600-38. The *Compendium* also suggests a number of "acceptable nature-of-work statements." The first suggestion for form PA is "Audiovisual work." *Ibid.*[3]

The Copyright Office avoids communicating with applicants if it is possible to register claims without doing so. See *Compendium II*, § 109.01, at 100-7 (1984) ("As a general policy the Copyright Office may register claims without communicating with the applicant whenever possible."). Because the nature-of-work statement rarely proves critical in light of information provided in other sections, the Copyright Office "[o]rdinarily * * * will not consider the omission or incorrect completion of information in the nature-of-work space as a reason, in itself, for communicating with the applicant." *Compendium II*, § 614, at 600-38.

2. Petitioner, a partnership of musicians and songwriters, was chosen to perform its song "Pop Goes the Music" on a television commercial produced for respondent Education Management Corporation (EMC). The title of the commercial is "Before the Crowd Roars." In 1991, petitioner performed "Pop Goes the Music" for use in the commercial; at the same time, it granted EMC a three-year license to use the song and the performance in the commercial. Petitioner

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[3] Where authors use the nature-of-work space to describe the physical medium in which the work has been fixed, it may assist the Copyright Office in identifying the deposit (the copy of the copyrighted work) that accompanies the application. In addition, where the nature-of-authorship statement is not adequate to determine the scope of the work for which registration is sought, the nature-of-work statement can serve to clarify ambiguities or otherwise provide omitted information. See *Compendium II*, § 614.01, at 600-38; *id.* § 619.03(b), at 600-74 to 600-75.

was compensated by being given a four-minute music video of its performance. Pet. App. 2a, 62a.

Petitioner alleges that, after the license period expired, EMC continued to air the commercial, including the performance of the song. Pet. App. 62a. In addition, EMC—without petitioner's knowledge or consent—licensed respondent Nirvana (a nationally known rock band) and respondent Geffen Records, Inc., to use, in a new music video, a portion of the commercial containing petitioner's song and performance of the song. *Id.* at 3a, 62a.

In July 1995, petitioner applied for copyright registration pursuant to 17 U.S.C. 409. See Pet. App. 77a. Petitioner identified the title of the work to be registered as "Pop Goes the Music," the nature of authorship as "[a]ll music & lyrics & arrangements," and the nature of the work as "[a]udiovisual." *Ibid.* As the deposit accompanying the application, petitioner submitted a videotape of the commercial, which included petitioner's performance of the musical work. The Copyright Office issued a certificate of registration. The certificate incorporates the application for copyright registration; it thus states that the title of the work is "Pop Goes the Music," names petitioner's members as the authors of the work, and identifies the "nature of authorship" as "[a]ll music & lyrics & arrangements." *Id.* at 77a, 79a. The certificate describes the "nature of this work" as "Audiovisual Work." *Id.* at 77a.

3. In October 1995, petitioner filed a copyright infringement action against respondents in district court, alleging unlicensed use of copyrighted materials.

a. On November 25, 1996, the district court dismissed the complaint without prejudice. Pet. App. 57a-75a.[4] The com-

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[4] The case had been referred to a magistrate, and the district court adopted the magistrate's report and recommendation of dismissal as the opinion of the court. Pet. App. 60a.

id. at 40a ("'inadvertent' description of the deposited medium rather than the song" in nature-of-work section of application a "fatal[] flaw[]"). Because petitioner "does not own a property interest in the video," the magistrate concluded, petitioner "can not maintain an infringement action which is based upon a copyright registration for an audiovisual work." *Ibid.* The district court, without further analysis, granted respondents' motion for reconsideration and dismissed the complaint. *Id.* at 34a-35a.

4. The court of appeals affirmed. Pet. App. 1a-33a. The issue, the court explained, is whether petitioner "has met the jurisdictional prerequisite for maintaining a copyright infringement action, namely a valid registration in the work that has allegedly been" infringed. *Id.* at 6a. In this case, petitioner had obtained a certificate of registration. *Id.* at 8a. However, the court continued, a registrant's knowing failure to advise the Copyright Office of facts that might have "occasioned the rejection" of the application for registration may render "the registration invalid and incapable of supporting an infringement action." *Id.* at 9a, 11a.

Here, the court observed, petitioner had entered on the "nature of this work" space on its application the words "Audiovisual Work." Pet. App. 11a. But petitioner had no copyright in the audiovisual work, because petitioner was not the author of the commercial. Petitioner instead held rights in and was the author of the song "Pop Goes the Music," which was performed in the commercial. *Ibid.* The court of appeals therefore concluded that the nature-of-work description was a material misstatement. Audiovisual works, the court stated, are very different from musical works. *Ibid.* "Had the Register of Copyrights known that [petitioner] did not author the audiovisual work identified in its registration," the court concluded, "it is likely that this rather fundamental misstatement would have occasioned the rejection of [petitioner's] application." *Ibid.*

The court also held that the misstatement could not be excused as immaterial or inadvertent. Pet. App. 12a-17a. Although courts of appeals generally excuse inadvertent misstatements, the court stated, none had excused an error as "fundamental" as a misdescription of the nature of the work where it effectively expanded the registration beyond matters in which the registrant had a copyright claim. *Id.* at 14a-15a. Nor was this "an innocent error," the court held, because there was no evidence that it was inadvertent. *Id.* at 15a-17a. Finally, the court rejected petitioner's claim that its attempt to supplement its registration eliminated any defect in the initial registration. *Id.* at 17a-22a.

Judge Alito dissented. Pet. App. 22a-33a. Petitioner's mistake in filling out the nature-of-work space in the application for registration, Judge Alito concluded, was inadvertent. *Id.* at 30a. Moreover, Judge Alito pointed out, the Copyright Office could not have been misled by the error. For one thing, the title of the work identified on the application was the title of the song ("Pop Goes the Music"), not the title of the commercial ("Before the Crowd Roars"). *Id.* at 31a. For another, the application's statement of the nature of authorship identified the matters covered as "[a]ll music & lyrics & arrangements." *Ibid.*

Petitioner's suggestion of rehearing en banc was denied by an equally divided court. Pet. App. 56a.

DISCUSSION

The court of appeals' decision does not conflict with that of any other court of appeals and correctly identifies the relevant legal principles. Its application of those principles to the facts of this case, however, is both incorrect and fundamentally inconsistent with longstanding Copyright Office policy. The decision thus has the potential to invalidate numerous copyright registrations that, in all respects, are consistent with Copyright Office policy, and could

eventually force the Office to alter its practices for future applications.

For that reason, the Copyright Office published a Statement of Policy in the Federal Register on July 5, 2000, to explain its practices and to amplify its interpretation of the application forms it promulgated and processes. See 65 Fed. Reg. 41,508.[5] As we discuss below, that Statement of Policy reiterates the Copyright Office's longstanding view that it is acceptable to use the nature-of-work space on an application for registration to describe the physical nature of the deposit, *i.e.*, the *format* in which the work is recorded, while using the nature-of-authorship section to describe the scope of the claimed copyright, which is what petitioner did here. See 65 Fed. Reg. at 41,508. The same view was previously articulated in the Office's *Compendium of Copyright Office Practices, Compendium II*, § 614, at 600-38, § 619, at 600-70 (Feb. 1988) (*Compendium II*). Because the court of appeals apparently was unaware of the Copyright Office's longstanding policies and practices, and acted without benefit of the Office's July 5, 2000, Statement of Policy, we believe it would be appropriate to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration.

1. Under the well-accepted "fraud on the Copyright Office" doctrine, the knowing submission of a misleading application for copyright registration may invalidate the resulting registration if awareness of the true facts might have caused the Copyright Office to deny registration. See *Whimsicality, Inc.* v. *Rubie's Costume Co.*, 891 F.2d 452, 456 (2d Cir. 1989); *S.O.S., Inc.* v. *Payday, Inc.*, 886 F.2d 1081, 1086 (9th Cir. 1989); 2 M. & D. Nimmer, *Nimmer on Copyright* § 7.20[B], at 7-209 (2000). In this case, the court of

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[5] For the Court's convenience, the Statement of Policy is reproduced as Appendix B to this brief.

appeals properly described that principle and cited some of the leading cases articulating it, including *Eckes* v. *Card Prices Update*, 736 F.2d 859 (2d Cir. 1984). See Pet. App. 10a, 11a. As *Eckes* explains, "the knowing failure to advise the Copyright Office of facts which might have occasioned a rejection of the application constitute[s] reason for holding the registration invalid and thus incapable of supporting an infringement action." 736 F.2d at 861-862 (internal quotation marks omitted).

Accordingly, we do not agree with petitioner's contention (Pet. 14-19) that the Third Circuit has established a test for "immateriality" that is contrary to decisions of other courts of appeals. The court of appeals in this case purported to examine whether the inaccuracy in the application might have influenced the Copyright Office's decision to issue the registration. See Pet. App. 10a (material misstatement may result in invalidation of registration if "the inaccuracy might have influenced the Copyright Office's decision to issue the registration."); *id.* at 11a (registration invalid where "misstatement would have occasioned the rejection of * * * [the] application."). That is precisely the test employed by other courts of appeals. As a leading treatise summarizes, "[i]f the claimant wilfully misstates or fails to state a fact that, if known, might have caused the Copyright Office to reject the application, then the registration may be ruled invalid." Nimmer, *supra*, § 7.20[B], at 7-209 (footnotes omitted). Thus, while we agree with petitioner that the court of appeals *misapplied* that rule, see pp. 13-16, *infra*, the misapplication of settled law to particular facts does not create a circuit conflict.

The court of appeals' rationale, moreover, is inextricably tied to the particular error the court attributed to petitioner. The court concluded that the Register of Copyrights would likely not have issued a certificate of registration to petitioner if she had known that the "nature of this work"

described in petitioner's application included matters for which petitioner could not claim a copyright. Pet. App. 11a. See also pp. 7-8, *supra* (similar rationale of magistrate). We know of no other court of appeals decision applying the fraud-on-the-Copyright-Office doctrine to a nature-of-work statement that allegedly extends the registration to matters in which the registrant cannot claim a copyright.[6]

Nor do we agree with petitioner's contention (Pet. 19-20) that the Third Circuit rejected the rule, followed in other circuits, under which fraud on the Copyright Office ordinarily will not be found absent an intent to defraud or mislead the Office. The court of appeals' reasoning assumed that an "inadvertent" misstatement would be excused. See Pet. App. 10a, 12a-13a, 15a. The court of appeals, however, found itself unable to "conclude that the misstatement was immaterial and unknowingly made," *id.* at 10a, that "the misstatement in the registration form was an innocent error," *id.* at 15a, or "that the inaccuracy in [petitioner'] 1995 registration was either immaterial or inadvertent," *id.* at 16a.

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[6] The decision in this case thus does not conflict with *Baron* v. *Leo Feist, Inc.*, 173 F.2d 288 (2d Cir. 1949), and *Urantia Foundation* v. *Kristen Maaherra*, 114 F.3d 955 (9th Cir. 1997), upon which petitioner relies (Pet. 17-18). In *Feist*, the registration application showed that it covered the musical arrangements, but did not indicate that it extended to the melodies as well. 173 F.2d at 289-290. Consequently, the alleged flaw in *Feist* was that the application omitted matters in which the author did have rights. The court of appeals' rationale in this case—that the Copyright Office would not have issued a certificate of registration because petitioner allegedly was seeking to register a work for which it did not have a copyright—simply has no bearing on cases that, like *Feist*, involve *underinclusive* registrations. For similar reasons, the decision in this case does not conflict with *Urantia*, *supra*. *Urantia* did not involve a misdescription of the nature of the work, but rather a misidentification of a "composite" work as a "work made for hire." 114 F.3d at 962. That error did not suggest that the applicant sought to register a work in which it held no rights.

2. Although the court of appeals' opinion correctly states applicable law, it seriously misapplies that law and reaches a result that is, in our view, decidedly incorrect. Based on the Copyright Office's longstanding policy governing the proper use and functions of the relevant portions of its application forms, see pp. 2-4, *supra*, the Copyright Office understood petitioner's application to present a claim in a musical composition (a song) and not in the deposited audiovisual work in which that composition appeared. See 65 Fed. Reg. at 41,508 & n.*. In particular, the Copyright Office relied on the nature-of-authorship statement to define the scope of the copyright claim; in this case, that statement specified authorship in "[a]ll music & lyrics & arrangements," and nowhere suggested that the claim extends to pictures or videos. See Pet. App. 77a, 79a. And the Copyright Office fully understood that petitioner had used the nature-of-work space to describe the *deposit*, *i.e.*, the form in which the work was being transmitted to the Copyright Office. Indeed, when petitioner sought to amend its registration to add the term "performance" to the nature-of-authorship statement, the Copyright Office Examiner wrote to petitioner explaining that "we understand that the reference to 'audiovisual work' on the application in space 1 did not extend the claim into the motion picture authorship present on the videotape, but simply identified the deposit format in which the song was fixed." *Id.* at 84a.[7] The Copyright Office thus was not, and under its practices should not be expected to have been, misled by petitioner's description of the nature of the work.

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[7] The court of appeals discounted that letter because it was written two years after the application was filed "and does not indicate what the Register of Copyrights would have likely done if all of the relevant facts were presented at the time of the registration." Pet. App. 12a n.2.

The contrary view of the court of appeals appears to stem from a misunderstanding of the purpose and function of the nature-of-work and nature-of-authorship spaces on the Copyright Office's forms. The court of appeals apparently was of the view that the nature-of-work portion of the application is "fundamental," Pet. App. 11a, and is designed to inform the Copyright Office of the scope of the copyright being claimed, see *id.* at 13a. See also *id.* at 15a (where registration "misidentifies the nature of * * * [the] work," it "fails to give proper notice to the Register of Copyrights regarding the * * * intellectual property for which protection is sought."). That is not correct. The Copyright Office has long made clear that the nature-of-authorship statement—not the description of the nature of the work—"defines the scope of the registration." *Compendium II*, § 619, at 600-70. See also 65 Fed. Reg. at 41,508 ("[T]he Office's practice has always been to look to the 'nature of authorship' statement in space 2 as the primary source" regarding the scope of the claim). Indeed, the instructions for completing Form PA explicitly direct applicants to use the nature-of-authorship space to describe the "nature of material * * * *in which copyright is claimed.*" Pet. App. 77a (emphasis added).[8]

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[8] The Copyright Office's circulars similarly demonstrate the central role played by the nature-of-authorship statement. Circular 56a, entitled *Copyright Registration of Musical Compositions and Sound Recordings*, http://www.loc.gov/copyright/circs/circ56a.pdf, provides detailed instructions on how the nature-of-authorship entry should be completed, but does not even mention the nature-of-work entry. Similarly, Circular 50, *Copyright Registration for Musical Compositions*, http://www.loc.gov/copyright/circs/circ50.pdf, provides detailed instructions on completing form PA, including instructions to "[c]omplete the 'Nature of Authorship' space to specify what the author created." Circular 50 does not mention the "nature of this work" entry.

Moreover, petitioner's use of the nature-of-work portion of the application to describe "the deposited medium rather than the song" for which copyright was claimed, Pet. App. 40a, is consistent with Copyright Office policy. Because the Copyright Office relies primarily on the nature-of-authorship statement to define the scope of the copyright, the Office long has considered it acceptable to use the nature-of-work space to identify the physical medium in which the work has been recorded or fixed, and which is being deposited with the Copyright Office. Thus, *Compendium II* explains that the "nature-of-work space" can be used to "give a description of the *general* nature and character of the work being registered," and specifically adds that a "description of *the physical form* of the work is *generally acceptable*." *Compendium II*, § 614, at 600-38 (emphasis added). See also 65 Fed. Reg. at 41,508 (The nature-of-work space "has also served as a description of the physical nature of the deposit" submitted with the application and "the Office has treated such a statement as acceptable * * *. The *Compendium* establishes this policy * * *."). Indeed, the Copyright Office *itself* sometimes uses the nature-of-work space to describe the deposit rather than the scope of the copyright claim. Where the application is incomplete but the claim's scope is otherwise clear, the Copyright Office "will annotate the nature-of-work space [to] describe the deposit." *Compendium II*, § 614.01, at 600-38.

Here, petitioner completed both the nature-of-authorship and nature-of-work sections of the application precisely as the Copyright Office anticipated. The nature-of-authorship statement clearly indicates that petitioner claimed rights in "[a]ll music & lyrics & arrangements," Pet. App. 77a, 79a, *i.e.*, the song for which petitioner does have a claim to copyright. (That conclusion is reinforced by the fact that petitioner identified the title of the work as "Pop Goes the Music," the song it authored and performed, not "Before the

Crowd Roars," the commercial. See *id.* at 31a (Alito, J., dissenting).) And petitioner used the nature-of-work space to describe the "physical form" in which work had been fixed and deposited, *i.e.*, an audiovisual work or videotape, *id.* at 77a, precisely as *Compendium II* authorizes. See *Compendium II*, § 614, at 600-38; 65 Fed. Reg. at 41,508 n.*. There is, in sum, no basis for finding a material misstatement where, as here, the applicant's form conforms with the Copyright Office's instructions and longstanding policies.

For those reasons, the Copyright Office has published a Statement of Policy in response to the court of appeals' decision. In that Statement, the Office notes that the statement of authorship generally controls the scope of registration, and explains and reiterates its view that "it has been and continues to be acceptable to" use "the 'nature of this work' space on Form PA" to "describe the physical nature of the deposit submitted with the application." 65 Fed. Reg. at 41,508. See also *ibid.* ("description of the physical nature of the deposit" is "acceptable where the nature of authorship statement and deposit make clear the scope of the copyright claim") (citing *Compendium II*, § 614). The Statement specifically discusses the factual situation addressed by the court of appeals in this case, *i.e.*, where the claimant describes the nature of the work as "audiovisual" and a videotape containing a performance of the musical work is deposited. In those circumstances, the Statement explains, the "audiovisual work" description remains acceptable in the view of the Copyright Office if the statement of authorship identifies the copyright as extending to "music and lyrics and arrangement." *Ibid.*

3. Although the court of appeals' decision is, in our view, incorrect and inconsistent with established Copyright Office policies, it is not clear that the decision warrants plenary review at this time. There is no conflict in appellate authority. But the decision is potentially significant. It

draws into question the status of numerous copyright registrations applied for and issued in reliance on the Copyright Office's longstanding practices relating to the nature-of-work and statement-of-authorship portions of the Office's forms. See 65 Fed. Reg. at 41,508 (decision "could jeopardize the validity of copyright registrations of musical works in a number of instances"). The resulting uncertainty, moreover, could adversely affect the Copyright Office's administration of the statute. In particular, the Office may confront a large administrative burden as registrants—uncertain of the status of their registrations—file applications for supplementary registration to clarify or amend their nature-of-work descriptions; the Office may also confront a flood of requests to cancel otherwise bona fide registrations, based on the court of appeals' decision. In the end, the Office might feel compelled to change its examination practices and carefully scrutinize the nature-of-work information on applications to ensure that the certificates of registration it issues will be found enforceable regardless of the circuit in which they are challenged.

In these circumstances, we believe the appropriate course would be to grant the petition, vacate the judgment of the court of appeals, and remand the decision for reconsideration in light of the Copyright Office's July 5, 2000, Statement of Policy. This Court considers "a GVR order * * * potentially appropriate" if "intervening developments, or recent developments * * * the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam); *id.* at 180 (Scalia, J., dissenting) (Court will vacate and remand if "an intervening event * * * has cast doubt on the judgment * * * concerning a

federal question"). Indeed, this Court will sometimes grant, vacate, and remand "in light of potentially pertinent matters which it appears that the lower court may not have considered." *Stutson* v. *United States*, 516 U.S. 193, 194 (1996) (per curiam).[9]

In this case, the court of appeals did not, at the time it issued its decision, have the benefit of the Copyright Office's July 5, 2000, Statement of Policy, which clarifies and amplifies the Office's longstanding policies regarding the nature-of-work and nature-of-authorship portions of its registration forms. The court of appeals, moreover, appears to have been entirely unaware of the longstanding Copyright Office policies memorialized in *Compendium II*. This Court has repeatedly concluded that action by an administrative agency that sheds light on an issue addressed by a court of appeals may constitute an intervening development that justifies granting a petition, vacating the judgment, and remanding for further consideration. See, *e.g.*, *Slekis* v. *Thomas*, 525 U.S. 1098, 1099 (1999) (judgment vacated and "case remanded for further consideration in light of the interpretive guidance issued by the Health Care Financing Administration"). See also *Schmidt* v. *Espy*, 513 U.S. 801 (1994); *Lawrence* v. *Chater*, *supra*. Given the potential impact of the court of appeals' decision on settled expectations and the administration of the Copyright statute—and because the Copyright Office's policies and views in this con-

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[9] See also *Thomas* v. *American Home Prods.*, 519 U.S. 913, 914-915 (1996) (Scalia, J., concurring) ("[W]e have never regarded Rule 10, which indicates the general character of reasons for which we will grant *plenary consideration*, as applicable to our practice of GVR'ing. Indeed, *most* of the cases in which we exercise our power to GVR plainly do not meet the 'tests' set forth in Rule 10. See, *e.g.*, *Schmidt* v. *Espy*, 513 U.S. 801 (1984) (GVR in light of administrative reinterpretations of federal statutes.)").

text may well prove determinative[10]—that course is likewise appropriate here.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of the views submitted in this brief and the Copyright Office's July 5, 2000, Statement of Policy, 65 Fed. Reg. 41,508.

Respectfully submitted.

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[10] As a practical matter, it is difficult to see how completing a form in a manner specifically countenanced by longstanding Copyright Office policy can be deemed to mislead the Office or otherwise constitute a misrepresentation. The Register's longstanding construction of the Copyright Act provisions she administers, moreover, is entitled to substantial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See also *Mazer* v. *Stein*, 347 U.S. 201, 212-213 (1954); *The Washingtonian Publ'g Co.* v. *Pearson*, 306 U.S. 30, 41 n.4 (1939).

APPENDIX A

Compendium of Copyright Office Practices, Compendium II (1988) (Excerpts)

614 *Nature-of-work space.* Forms PA and VA contain a nature-of-work space. This space should give a description of the general nature and character of the work being registered. A description of the physical form of the work is generally acceptable. Ordinarily, the Copyright Office will not consider the omission or incorrect completion of information in the nature-of-work space as a reason, in itself, for communicating with the applicant. The nature-of-work statement may be considered an adequate statement of the basis of the claim where the authorship space is blank or the statement of authorship is not specific. See sections 619 and 626 below. Examples of acceptable nature-of-work statements:

1) PA Applications:
"Audiovisual work"
"Choreography"
"Drama"
"Motion Picture"
"Music"
"Song lyrics"

2) VA Applications:
"Charcoal drawing"
"Etching"
"Fabric design"
"Jewelry design"
"Map"
"Oil painting"
"Photograph"
"Sculpture"
"Technical drawing"

614.01 *Nature-of-work space: both nature-of-work and nature-of-authorship statements omitted.* Where both the nature-of-work and the nature-of-authorship statements are nondescriptive or are omitted altogether, but the extent of the claim is clear, the

Copyright Office will annotate the nature-of-work space and describe the deposit.

Examples of annotations:

1) "Deposit contains artwork."

2) "Lyrics and music deposited."

3) "Deposit consists of identifying material for soft sculpture."

* * * * *

619 *Nature-of-authorship statement.* In general, the nature of authorship defines the scope of the registration; therefore, it represents an important copyright fact.

619.01 *Nature-of-authorship statement: location on application.* The nature-of-authorship statement on an application should be given at the block designated "Author of," or "Nature of Authorship." In cases where the nature of an author's contribution is indicated elsewhere on the application, the application will be accepted if the extent of the claim is clear. See section 626.03(a) below.

619.02 *Nature of authorship: appropriate description.* The nature-of-authorship statement is a brief general statement of the nature of the author's contribution to the work. In general, the author's contribution may be described in terms of the categories specified in the copyright law, including: nondramatic literary work, musical work,

musical work with words, dramatic work, dramatic work with music, pantomime, choreographic work, pictorial, graphic, and sculptural work, audiovisual work (including a motion picture), or a sound recording. Other acceptable descriptive terms are: computer program, book, periodical, lecture, sermon, map, work of art, reproduction of a work of art, technical drawing, print, and label for advertising. Where the Copyright Office can ascertain the nature of authorship from a physical description of the material object in which the work is embodied, such descriptions will be acceptable, e.g., newspaper, cartoon, model, globe, chart, film, puppet, hologram. See Chapter 500: COPYRIGHTABLE MATTER - PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS, Chapter 300: COPYRIGHTABLE MATTER – NONDRAMATIC LITERARY WORKS, and Chapter 400: COPYRIGHTABLE MATTER - WORKS OF THE PERFORMING ARTS AND SOUND RECORDINGS. Other appropriate descriptions include—

Class VA:	Class TX:
artwork	collective work
cartographic work	compilation
drawing	data base
fabric design	instructions
greeting card artwork	magazine article
illustration	novel
jewelry design	poetry
lithography	text
oil painting	

photograph
reproduction of work of art
sculpture
soft sculpture
technical drawing

Class PA
(In general):

dance
drama
instrumental music
music and lyrics
play
sermon
song lyrics

Class PA
(Multimedia Kits):

filmstrip
illustrations
printed text
recorded text
sounds
workbook

Class PA (Motion pictures and motion picture components):

cinematic work
cinematography
entire work
music
narration
screenplay
script
sound track

Class SR
(In general):

performance
sound recording

Class SR (Multi-media kits without a visual element):

performance
sound recording

engineering	text
	workbook

* * * * *

619.03(b) *Nonspecific description: author's contribution given at nature-of-work space.* In general, if the description at the nature-of-authorship space is insufficient to describe the claim, but statements at the nature-of-work space describe the authorship in the deposit, the application will be accepted.

Example:

A copy of a choreographic work is submitted with an application Form PA. One author is named on the application, but the "Author of" space gives only the title of the work. The statement given in the nature-of-work space is "Choreography." The application will be accepted.

619.04 *Nature-of-authorship statement: omitted.* Where the nature of an author's contribution is omitted from the application, but the author's name is given, whether or not the application will be accepted will depend upon whether the extent of the claim is reasonably clear, and whether the nature of authorship is clearly identifiable from the deposit. Where the application contains no information about the nature of the authorship but the author's contribution is identifiable from the deposit, the Copyright Office will accept the application, annotating where appropriate.

Examples: (assume that the works are entirely new.)

1) A Form VA application is submitted for a two-dimensional original watercolor. The application names the author, but no nature-of-authorship statement is given. The nature-of-work statement is "Painting." The application will be accepted without annotation.

2) A Form PA is received with a radio broadcast script. Neither a nature-of-authorship statement nor a nature-of-work statement is given. The deposit contains the statement: "Script by John Doe." The application will be annotated.

3) An application Form TX is submitted with a game board, a map, and a computer program. The application contains no indication of the extent of the claim, but Compuzese Company is named as author of a work made for hire. The application is acceptable on the assumption that the company's employees contributed the entire copyrightable content.

4) An application Form SR is submitted, naming Jill Maddox as author, but giving no description of her authorship. In the nature-of-material-recorded space, "Musical" is checked. The phonorecord contains a musical composition consisting of words and music. The

Copyright Office will communicate with the applicant to determine whether the claim is in the musical composition, the sound recording, or both.

* * * * *

619.08(a) *Variances with deposit material: more material present than claimed.* Where the deposit material contains more authorship than is claimed on the application, the Copyright Office will ordinarily register the claim as submitted, without annotation. If, however, the work is by one author and the deposit contains a specific statement crediting that author with all elements, the application will be annotated to reflect the authorship statement on the deposit. Where the application names only one person as author of one element and the deposit names another person as both co-author of that element and as sole author of a second element, the Office will communicate with the applicant to determine the extent of the claim.

Examples:

1) A musical composition consisting of words and music is deposited with an application naming only the author of the music. The words are not otherwise accounted for on the application. The Copyright Office will accept the application as submitted.

2) An application names John Doe as author of "music." The deposit contains words and music and states "Words and Music by John Doe." The Copyright Office will register the claim with an annotation on the application reflecting the authorship statement given on the deposit.

3) A musical composition consisting of words and music is deposited with an application naming only John Doe as author of "words." The deposit names John Doe and Mary Smith as co-authors of words and Mary Smith as author of music. The Copyright Office will communicate with the applicant to determine the extent of the claim.

4) An application for a literary work is submitted claiming only "Text." The deposit also contains a few pictorial illustrations. The Copyright Office will register the claim as submitted.

APPENDIX B

65 Fed. Reg. 41,508 states as follows:

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2000-6]

Registration of Claims to Copyright

AGENCY: Copyright Office, Library of Congress.

ACTION: Statement of policy.

SUMMARY: The Copyright Office of the Library of Congress issues this statement of policy to clarify the practices relating to examination of copyright claims in music, and the relevance of the "nature-of-work" designation at space 1 of the PA Form.

EFFECTIVE DATE: July 5, 2000.

FOR FURTHER INFORMATION CONTACT: David O. Carson, General Counsel, or Charlotte Douglas, Principal Legal Advisor, Copyright Office, Library of Congress, Washington, DC 20540. Telephone: (202) 707-8380. Telefax: (202) 707-8366.

SUPPLEMENTARY INFORMATION: The Copyright Office is issuing this statement of policy to clarify its examination practices with respect to the "nature-of-work" space on Form PA, for registration of works of the performing arts. This policy statement is in response to a recent

judicial decision by the United States Court of Appeals for the Third Circuit in *Raquel* v. *Education Management Corp.*, 196 F.3d 171 (3rd Cir. 1999) [hereinafter referred to as *Raquel*], in which the court appears to have misunderstood the Copyright Office's longstanding published practices relating to the "nature-of-work" space.

In *Raquel*, the court held that a certificate of registration of a copyright was invalid because the claimants, authors of the copyright in a musical composition, had described the "nature of this work" in space 1 of their Form PA application as "Audiovisual work." The deposit submitted with the application was a videotape of a television commercial in which the claimants' musical composition was performed. The court concluded, and the claimants do not appear to have contested, that the claimants did not own any copyright interest in the television commercial itself. In space 2, the application had correctly designated the nature of authorship as "All music and lyrics and arrangement."

A key element of the court's reasoning in invalidating the registration was the court's conclusion that "[h]ad the Register of Copyrights known that *Raquel* did not author the audiovisual work identified in its registration, it is likely that this rather fundamental misstatement would have occasioned the rejection of Raquel's application." 196 F.3d at 177. Based upon this prediction of what the Copyright Office would have done if it had known the claimants had not authored the television commercial, the court concluded that the claimants had made a material misrepresentation in the application for registration. The court also concluded that this misrepresentation could not have been inadvertent. As a result, the court applied the principle that a plaintiff's knowing failure to advise the Copyright Office, in an application for copyright registration, of material facts which

might have led to the rejection of a registration application constitutes grounds for holding the registration invalid and incapable of supporting an infringement action. 196 F.3d at 176 (citing *Masquerade Novelty, Inc.* v. *Unique Indus., Inc.*, 912 F.2d 663, 667 (3d Cir. 1990)).

The *Raquel* case raises questions concerning the "nature of this work" space on the Form PA application for copyright registration. If applied strictly, the decision could jeopardize the validity of copyright registrations of musical works in a number of instances. Because of the possibility that other courts will rely on *Raquel* as valid precedent for invalidating copyright registrations under similar circumstances, the Copyright Office is issuing this policy statement to clarify that it was not misled in registering the copyright claim in the *Raquel* case, and that the Copyright Office knew that the copyright claim was in a musical work, and not an audiovisual work. The Office is also issuing this statement to clarify that in the "nature of this work" space on Form PA, it has been and continues to be acceptable to describe the physical nature of the deposit submitted with the application.

While section 409 of the copyright law largely dictates the content of the application form, this statutory section does not require a nature-of-work space. This space was added to the PA and VA forms because these forms cover a number of different categories of works, and it was believed the additional information would clarify the general character or the type or category of the work being registered. In practice, however, the information provided in this space by applicants often does not relate to the nature of the claim; and the Office's practice has always been to look to the "nature of authorship" statement in space 2 as the primary source of such information. See *Compendium of Copyright*

Office Practices, Compendium II ("*Compendium II*"), § 619 (1988) ("In general, the nature of authorship defines the scope of the registration; therefore, it represents an important copyright fact"). If, on the basis of the deposit and the nature of authorship statement, the nature of the copyright claim is clear, the Copyright Office will proceed with registration.

Ideally, the nature-of-work space should describe the work being registered. In practice, it has served a variety of functions, *e.g.*, as a substitute for the statement of authorship (when such a statement was lacking) or as a supplementary description augmenting the statement of authorship. It has also served as a description of the physical nature of the deposit, and the Office has treated such a statement as acceptable where the nature of authorship statement and deposit make clear the scope of the copyright claim being registered. The *Compendium* establishes this policy in the following language: "Forms PA and VA contain a nature-of-work space. This space should give a description of the general nature and character of the work being registered. A description of the physical form of the work is generally acceptable. Ordinarily, the Copyright Office will not consider the omission or incorrect completion of information in the nature-of-work space as a reason, in itself, for communicating with the applicant * * *" *Compendium II*, § 614.

In *Raquel*, the nature of authorship line described the copyright claim as "All music and lyrics and arrangement." The deposit consisted of a videotape which contained the musical composition being registered. In the nature of work space, the applicant stated "audiovisual work." Consistent with general Copyright Office practice, the Office regarded the copyright claim to be in a musical composition, and no

communication with the applicant was made regarding the reference to "audiovisual work" in the nature-of-work space since it was regarded as a physical description of the work being registered.*

The Office will continue to accept applications in which the "nature of this work" space describes the physical nature of the deposit rather than the scope of the copyright claim. However, the decision of the Third Circuit in *Raquel* demonstrates that there is some risk in engaging in this practice. It is hoped that this statement of policy, clarifying what the Office's practice has been and will continue to be, will offer guidance to the courts and to litigants about the Office's examination practices with respect to the nature-of-work space, and will prevent other courts addressing situations similar to that in *Raquel* from reaching the same result as in *Raquel.*

Dated: June 27, 2000.

Marybeth Peters,

Register of Copyrights.

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* Strictly speaking, an "audiovisual work" is one of the categories of works enumerated in section 102 of the Copyright Act, 17 U.S.C. 102. See also 17 U.S.C. 101 (definition of "audiovisual works"). Thus, it is understandable how the court of appeals could have interpreted the entry of "audiovisual work" in the "nature of this work" space as a description of the scope of Raquel's claim. However, given the Office's practice of accepting descriptions of the physical form of the deposit, and given the Office's practice of looking to the "nature of authorship" statement for a description of the scope of the claim, the Office understood the term "audiovisual work" in this context to be a physical description of the deposit.

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